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NO. 53761-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CALVIN J. JOHNSON,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Under the American rule, a party may only receive attorney fees if authorized by a statute or other recognized ground. The attorney fees provision in the firefighters' presumption statute does not shift fees to the Department of Labor & Industries for all workers' compensation appeals an injured firefighter might file. Instead, the Legislature narrowly crafted an attorney fee provision, reflecting the principle that a party seldom receives fees at the administrative level in an appeal to the Board of Industrial Insurance Appeals.

RCW 51.32.185 creates a presumption that certain medical conditions are occupational diseases, which helps firefighters get such claims allowed. And if the allowance of the claim is litigated and the firefighter prevails in having it allowed, the firefighter receives litigation costs.

Firefighters may receive attorney fees at the Board only “[w]hen a determination involving the [firefighter] presumption” “is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits[.]” RCW 51.32.185(9)(a). But Johnson seeks fees for a case that does not involve claim allowance and that therefore does not implicate the presumption; instead, he sought to reopen his occupational disease claim that the Department had allowed before (after already

applying the presumption). Thus, the appeal of the reopening order was not about claim allowance or the presumption. Applying the plain language of RCW 51.32.185(9)(a), the Board correctly declined to award attorney fees. But after Johnson appealed the Board's refusal to order attorney fees, the superior court reversed and allowed fees. This Court should reverse the superior court and hold that attorney fees are unavailable under RCW 51.32.185 here.

II. ASSIGNMENT OF ERRORS

1. The superior court erred by entering its order dated June 13, 2019; specifically it erred when it granted summary judgment to Johnson and failed to grant summary judgment to the Department. It further erred by ordering the Department to pay attorney fees and costs before the Board and Lewis County Superior Court.
2. The superior court erred by entering its judgment dated August 13, 2019; specifically it erred when it granted summary judgment to Johnson and failed to grant summary judgment to the Department. It further erred by ordering the Department to pay attorney fees and costs before the Board and Lewis County Superior Court.

III. ISSUE RELATED TO ASSIGNMENT OF ERRORS

When firefighters file workers' compensation claims they are entitled to the presumption that certain conditions are occupational diseases and are entitled to attorney fees in limited circumstances. To receive attorney fees at the Board a firefighter must establish (1) the appeal was of a "determination involving the presumption" and (2) the Board's final decision "allow[ed] the claim for benefits." RCW 51.32.185(9)(a). Johnson appealed an order about reopening his claim, which did not require him to prove the elements of claim allowance.

Did this litigation involve the presumption and claim allowance so that attorney fees may be awarded?

IV. STATEMENT OF FACTS

A. Overview of Applicable Workers' Compensation Principles

Workers may file workers' compensation claims for industrial injuries and occupational diseases. RCW 51.28.020, .050, .055; RCW 51.32.010, .180. A worker files an accident report to open a claim for benefits under the occupational disease statute, RCW 51.08.140. AR 226-27;¹ RCW 51.28.020; WAC 296-15-405.² A worker must file an occupational disease claim within two years of notification by a doctor that the worker has developed an occupational disease. RCW 51.28.055. The worker files only one accident report to open a claim and the Department assigns one claim number to the claim. *See* AR 226-27; WAC 296-15-405. The Department issues a claim allowance order. *Weaver v. City of Everett*, __ Wn.2d ___, 450 P.3d 177, 181, 183 (2019).

If the Department allows a claim, it will pay eligible benefits on the claim. But before any benefits can be due, the Department must first issue an order about whether to allow the claim or not, which requires it to determine that the claim was filed before the statute of limitations expired,

¹ The certified appeal board record is cited as "AR." Testimony within the certified appeal board record is cited as "AR" followed by the witness name and page number.

² *See* Dep't of Labor & Indus., *Filing Your Claim*, <https://www.lni.wa.gov/ClaimsIns/Claims/File/FilingClaim/default.asp>.

that there was an industrial injury or occupational disease, that the claimant was in the course of employment when injured, that the claimant is a worker, and that the claimant was engaged in covered employment. RCW 51.08.100, .140, .180; RCW 51.12.020; RCW 51.28.050, .055; RCW 51.32.010.

The burden of proving an occupational disease under the Industrial Insurance Act generally falls to the worker. *See Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744 (2014) (persons who claim rights under the Industrial Insurance Act must show “strict proof of their right to receive the benefits provided by the act.”); RCW 51.52.050(2)(a). But RCW 51.32.185 provides a rebuttable presumption for firefighters that certain medical conditions for firefighters are occupational diseases. RCW 51.32.185(1), RCW 51.32.185(4).

For heart attacks such as the one suffered by Calvin Johnson in April 2015, there is a “prima facie presumption that: (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities . . . are occupational diseases under RCW 51.08.140.” RCW 51.32.185(1)(a). The

presumption that a condition is an occupational disease may be rebutted.
RCW 51.32.185(1)(d).

The Department applies the presumption that a condition is an occupational disease at the time that it decides whether to allow the claim or not. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 736, 389 P.3d 504 (2017). If the Department does not allow the occupational disease claim, the firefighter may appeal to the Board. RCW 51.52.050, .060. Or alternatively, the employer may appeal to the Board. The presumption that the occupational disease claim should have been allowed also applies at the Board. *Spivey*, 187 Wn.2d at 736.

If a “determination involving the presumption” is appealed to the Board by either the worker or the employer and the Board orders the Department to “allow[] the claim for benefits,” the firefighters receives reasonable attorney fees and costs. RCW 51.32.185(9)(a).³ The statute provides:

When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the

³ This may be paid by either the Department or a self-insured employer depending on whether the case was under the state fund or a self-insured employer. RCW 51.32.185(9)(c).

firefighter, fire investigator, or law enforcement officer, or his or her beneficiary by the opposing party.

RCW 51.32.185(9)(a).

After the Department decides or is ordered by the Board to allow a claim, the worker becomes eligible for benefits under the Industrial Insurance Act. RCW 51.32.010, .180; RCW 51.16.040. The Department then decides whether the worker needs proper and necessary treatment, and whether temporary total disability and vocational benefits are appropriate. RCW 51.32.090, .095, .099; RCW 51.36.010; WAC 296-20-01002.

When the worker completes all necessary treatment and the worker's condition has reached "maximum medical improvement" and is "fixed," the Department decides whether the worker should receive either permanent partial disability or permanent total disability benefits. RCW 51.32.055, RCW 51.32.060, .080; WAC 296-20-01002; *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 111, 206 P.3d 657 (2009); *Pend Oreille Mines & Metal Co. v. Dep't of Labor & Indus.*, 64 Wn.2d 270, 272, 391 P.2d 210 (1964). It then closes the claim. RCW 51.32.055.

After an allowed claim is closed, a worker can seek to reopen it if the worker's condition worsens. RCW 51.32.160; *Lindsey v. Dep't of*

Labor & Indus., 35 Wn.2d 370, 371-74, 213 P.2d 316 (1949). To reopen, the worker need not prove whether the worker has an occupational disease or the other elements of claim allowance: instead, the worker must show only that the worker's occupational disease worsened. *See Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993). The worker needs to present objective medical evidence that the worker's occupational disease worsened between relevant dates (the date of last closing and the date of the order denying reopening). *See Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). Proving the statutory requirements for claim allowance again are not elements. *See id.*

B. The Department Applied the Firefighter Presumption When It Allowed Johnson's Occupational Disease Claim

Johnson had a myocardial infarction—a heart attack—on April 15, 2015. Board's FF 2 at AR 213; AR 418-20, 484, 518; RCW 51.08.140.⁴ He had physical exertion and exposure to diesel fumes before the heart attack. AR 477, 480. After Johnson filed an accident report to have a claim opened, the Department applied the presumption that heart problems arising 72 hours from exposure to fumes or 24 hours from exertion are

⁴The findings of fact in the proposed decision and order adopted by the Board are found at AR 213. Johnson did not petition for review of these findings under RCW 51.04.104 nor did he contest those findings at superior court and they are verities. *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012); *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 879, 288 P.3d 390 (2012).

occupational diseases to Johnson's claim. AR 26; RCW 51.32.185. It then allowed Johnson's claim under RCW 51.32.185. AR 26. The Department provided treatment and other benefits to Johnson. AR 26, 417.

Johnson then passed a treadmill test and an examination showed that he did not have physical findings proximately caused by the occupational disease. Board's FF 3 at AR 213; AR 484-85, 519, 525-27. So the Department closed the claim on January 21, 2016, with no permanent partial disability. AR 27-28; *see* AR 528-29.

C. Johnson Sought to Reopen His Occupational Disease Claim and Prevailed on His Appeal at the Board

After his claim closed, Johnson had persistent pain symptoms. AR 487. At first, his doctors thought it was gall bladder pain. AR 487. So he had gall bladder surgery on January 29, 2016. AR 485. But after the surgery, he continued to have pain and his doctor told him to go to the emergency room on February 3, 2016. AR 432, 486-87. The emergency room determined that he had findings consistent with a new myocardial event. AR 487. According to his doctor, the new event did not occur within 24 hours of exertion at work or 72 hours of exposure to fumes. *See* AR 485, 490. His doctor believed the 2016 problem was one that carried forth from his event in 2015, which he did not think had ever resolved.

AR 503. In other words, the doctor believed that the 2016 event arose from the 2015 event. AR 503.

On December 13, 2016, Johnson applied to reopen his claim, claiming his condition worsened. Board's FF 5 at AR 213; AR 30-31; *see also* AR 488. The "Application to Reopen Claim" form instructs it should only be used if a medical condition has worsened and the claim has been closed. AR 30. Because the Department did not think his condition worsened as a proximate result of the occupational disease, it denied the reopening application. AR .33. Johnson appealed to the Board. AR 327.

The industrial appeals judge considered whether the heart condition was an aggravation of the occupational disease for which the claim had been filed or a new event unrelated to the occupational disease. AR 210. He issued a proposed decision and order finding that Johnson's condition after claim closure in January 21, 2016, was an aggravation of the July 2015 event, noting that the "preponderance of the evidence was persuasive that Mr. Johnson's occupational disease worsened and became aggravated after January 21, 2016." AR 212. He found that "[t]he objective evidence of worsening of a heart problem, allowed as an occupational disease, was aggravated, as shown by medical evidence between the terminal dates." Board's FF 5 at AR 213. He also found that Johnson had a "second set of stents and objective findings proximately

caused by the occupational disease.” Board’s FF 6 at AR 213. And he found and concluded “Mr. Johnson’s heart problem, proximately caused by the occupational disease, objectively worsened between January 21, 2016 and May 26, 2017.” Board’s FF 7 and CL 2 at AR 213. The Board adopted the proposed decision and order, which will result in the Department reopening Johnson’s occupational disease claim. AR 94.

After the Board issued its order, Johnson filed a motion for attorney fees and costs based on RCW 51.32.185(9)(a). AR 71-82. The Board denied Johnson’s request. AR 1-2. It reasoned that the plain language of RCW 51.32.185 includes an award of fees and costs only when the Board’s final decision allows the claim for benefits, which was not the case here. AR 1-2. Johnson appealed to superior court. CP 1-7.

D. The Superior Court Concluded that Johnson Was Entitled to Attorney Fees and Costs

At superior court, Johnson requested that the superior court reverse the Board and award him reasonable attorney fees and costs for work at the Board. CP 8-13. Johnson argued that the fees provision in RCW 51.32.185 applies to reopening appeals because it was a “claim for benefits.” CP 11, 178. The superior court agreed. CP 188-189. The Department appeals. CP 190.

V. STANDARD OF REVIEW

In workers' compensation cases, the ordinary civil standard of review applies. RCW 51.52.140; *Birgen v. Dep't of Labor & Indus. of State*, 186 Wn. App. 851, 855, 347 P.3d 503 (2015). The appellate court reviews the trial court decision, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Administrative Procedure Act does not apply. *Id.* at 180. Questions of law are reviewed de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Here, the parties do not dispute the facts material to this Court's determination.

On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Summary judgment is appropriate when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Bennerstrom*, 120 Wn. App. at 858. Here, the parties dispute the application of RCW 51.32.185(9)(a) to the undisputed facts, so the standard of review is de novo. *See Bennerstrom*, 120 Wn. App. at 858.

VI. ARGUMENT

Under the American rule, attorney fees are awarded only when provided by statute or other recognized ground. *Interlake Sporting Ass'n, Inc. v. Washington State Boundary Review Bd. for King Cty.*, 158 Wn.2d 545, 560, 146 P.3d 904 (2006). The Legislature seldom authorizes fees for work at the Board. *See Borenstein v. Dep't of Labor & Indus.*, 49 Wn.2d 675, 676, 306 P.2d 228 (1957); *Rosales v. Dep't of Labor & Indus.*, 40 Wn. App. 712, 716, 700 P.2d 748 (1985).

A narrow exception for firefighters applies when two elements are met: (1) a “determination involving the presumption” has been appealed and (2) the Board has issued a “final decision [that] allows the claim for benefits.” RCW 51.32.185(9)(a). Johnson did not show either element: (1) The reopening application did not involve the presumption because the presumption is relevant only when deciding whether a condition is an occupational disease so that a claim may be opened. (2) Allowance of the claim for benefits refers to the initial application for benefits to allow the claim and does not include reopening applications. This Court should reverse.

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A. The Plain Language of RCW 51.32.185(9)(a) Shifts Costs to the Department When a Determination Involves a Firefighter’s Occupational Disease Claim for Benefits

Johnson’s request for attorney fees is refuted by RCW 51.32.185’s statutory language. RCW 51.32.185(9)(a) requires:

When a determination *involving the presumption* established in this section is appealed to the board of industrial insurance appeals and the *final decision allows the claim for benefits*, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(Emphasis added.) The fundamental purpose in interpreting a statute is to give effect to the Legislature’s intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). If the statute’s meaning is plain, then the court must give effect to that plain meaning as an expression of the Legislature’s intent. *Id.* Under the plain language, to receive benefits, a party must show: that (1) a “determination involving the presumption” has been appealed and (2) the Board has issued a “final decision [that] allows the claim for benefits.” RCW 51.32.185(9)(a).

1. The firefighter presumption is involved only in claim allowance determinations

The firefighter presumption is only involved in claim allowance determinations. *Weaver*, 450 P.3d at 181, 183; *Raum v. City of Bellevue*, 171 Wn. App. 124, 144, 286 P.3d 695 (2012). Workers may file claims for

occupational diseases. RCW 51.28.020. For an occupational disease claim, a worker typically must present expert medical evidence that the condition “arises naturally and proximately out of employment.” RCW 51.08.140; *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 189, 399 P.3d 1156 (2017). RCW 51.32.185 provides a presumption that certain identified medical conditions “are occupational diseases under RCW 51.08.140.” RCW 51.32.185(1); *see Spivey*, 187 Wn.2d at 727. RCW 51.32.185 provides “a prima facie presumption that . . . any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities . . . are occupational diseases under RCW 51.08.140.” So if a firefighter develops one of those conditions and files an occupational disease claim, the firefighter does not have to first come forward with evidence that the firefighter’s condition arose naturally and proximately caused the firefighter’s condition, and can instead rely on a presumption that the occupational disease claim should be allowed, which the employer or Department would have to rebut if they believe the claim should not be allowed. RCW 51.08.140; RCW 51.32.185. If the presumption is not rebutted, the claim is allowed.

But while RCW 51.32.185 creates a rebuttable presumption that certain medical conditions are occupational diseases, it does not create a

presumption that the worker's claim should be reopened if the worker later believes that it has worsened. Rather, once a claim is allowed (and later closed), a worker—whether a firefighter or not—can seek reopening under RCW 51.32.160, but this statute only requires the worker to show worsening of the occupational disease. *See Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 353, 409 P.3d 1162, *review denied*, 190 Wn.2d 1030 (2018). In other words, an allowance claim is about whether an occupational disease exists and a reopening case is about whether the occupational disease has worsened. RCW 51.32.160 provides:

If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment . . .

Under RCW 51.32.160, the inquiry is whether there has been an “aggravation . . . of disability.” A worker who has filed an “application to reopen” under RCW 51.32.160 must prove by objective findings that the occupational disease worsened between the relevant dates. AR 30-31; *Phillips*, 49 Wn.2d at 197. So, a worker need not show that their work place exposure caused them to have an occupational disease under RCW 51.08.140 because that issue has already been decided in a final order. Here there was a prior Department decision already allowing his

claim. AR 26. So to prove aggravation under RCW 51.32.160, Johnson need only show that during the relevant dates the previously allowed condition has worsened as a proximate cause of the occupational disease.

Workplace exposure and the application of the presumption to that exposure is relevant only when the occupational disease claim is first allowed. Additional exposure in an occupational disease claim is the basis for a new occupational disease claim, not the reopening of an existing claim. *See In re Gerald E. Berg*, No. 1116271, 2012 WL 6857328, *10 (Wash. Bd. Ind. Ins. App. Oct. 18, 2012). If Johnson filed a new claim for new exposure that caused a new heart condition, then the presumption would apply to the new claim, so long as the heart condition was experienced within seventy-two hours of exposure or within twenty-four hours of exertive firefighter activities. *See* RCW 51.32.185(1). According to Johnson's doctor, such exposure did not occur here. AR 490.

Thus, in this reopening situation, the determination does not "involv[e] the presumption." The relevant definition of involve means "to relate closely: CONNECT." *Merriam-Webster Dictionary*,⁵ The history of a claim that has been allowed applying the presumption and then closed is not a sufficient connection with the statutory presumption to support a fee

⁵ <https://www.merriam-webster.com/dictionary/involve>.

award. Instead, RCW 51.32.185(9)(a) requires a direct connection and applies only “[w]hen a determination involving the presumption . . . is appealed to the board.” The mere fact that, historically, the firefighter’s occupational disease claim was allowed at some point is not enough to make the Board appeal one that “involv[es]” the presumption in the way that the statute requires.

Johnson suggests that the requirement to show that there is a “determination involving the presumption” is met because his claim was originally subject to the presumption when it was first opened. CP 178-79. He characterizes the claim as “[t]he claim for ‘heart problem pursuant to RCW 51.32.185’” and calls it a “presumptive heart problem” or a “RCW 51.32.185 presumptive occupational heart problem disease” claim CP 11; AR 5-6. He implicitly raises the argument, rejected by other courts, that RCW 51.32.185 does not simply create a presumption that certain occupational disease claims should be allowed, but creates a novel type of occupational disease claim for firefighters. AR 76. A firefighter’s occupational claim is the same as any other occupational disease claim: the only difference is that RCW 51.32.185 creates a rebuttable presumption for firefighters that certain occupational disease claims should be allowed. *Raum*, 171 Wn. App. at 144. In *Raum*, the court emphasized that “RCW 51.32.185’s presumption eliminates only the

requirement that Raum present competent medical evidence *at the outset* to show that his heart condition is related to his firefighting duties and thus an occupational disease.” *Raum*, 171 Wn. App. at 144 (emphasis in original). The court concluded that “RCW 51.32.185 does nothing more than create a rebuttable evidentiary presumption. We conclude the statute creates no occupational disease claim different from that defined in RCW 51.08.140.” *Id.* at 144. Thus, the presumption is about determining whether there is an occupational disease so that the Department will allow the claim. It does not provide a continuing characteristic of the claim. In other words, aside from having a presumption that made it easier for him to have his occupational disease claim allowed, his occupational disease claim is no different from any other occupational disease claim. And once a firefighter’s occupational disease claim has been allowed, the Legislature created no special rules for the continuing adjudication of the claim.

Here, the determination at issue in the appeal does not “involve[e] the presumption” that Johnson has an occupational disease, because the Department has already applied the presumption to allow Johnson’s heart condition when he previously filed his claim for benefits. *See* CP 25. At issue in this appeal was only Johnson’s request to reopen the claim. AR 30-31; *see also* AR 488. In the current case, Johnson’s occupational

disease claim had been allowed through a final and binding order, and the only issue on appeal was whether his allowed occupational disease claim had worsened. AR 26, 213. So the presumption the statute creates—that Johnson has an allowable occupational disease claim based on his heart problem—does not apply to the question in the current case of whether that condition later worsened. And because the presumption did not apply, Johnson cannot receive attorney fees under RCW 51.32.185.

2. The phrase “allows the claim for benefits” means the claim allowance decision at the outset

Besides not showing that his case was one where there was a “determination involving the presumption,” Johnson also does not show that the “final decision” in this case “allows the claim for benefits.” RCW 51.32.185(9)(a). The court discerns plain meaning from the ordinary meaning of the language, the context of the statute in which that provision is found, related provisions, and the statutory scheme. *Larson*, 184 Wn.2d at 848. The meaning of a statute is determined by its words and by “all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007). The plain language of

RCW 51.32.185(9)(a), its related statutes, administrative rules, and case law show that this language refers to the initial application for the Department to allow the occupational disease claim, not the application to reopen that claim once allowed.

Johnson asserted below that “a final decision [that] allows the claim for benefits” means receiving any benefits after reopening has been granted. CP 11. But Johnson ignores the statutory scheme and the plain meaning of the terms.

- a. **The Industrial Insurance Act contemplates a claim that is first opened, then closed, and then may be reopened related to the same work condition**

Under the Industrial Insurance Act, a worker may file a claim for any particular injury or disease the worker believes is occupational. But there is only one claim per injury or disease. RCW 51.28.020. Once closed, that claim may be reopened if that particular injury or disease worsens as a proximate cause of the original circumstance.

RCW 51.32.160; *Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d at 353. A claim can be reopened more than once if the facts warrant, because that specific claim is attached to the proximate cause of the injury or disease. In contrast, an injury or disease arising from a different proximate cause requires a separate claim. *Berg*, 2012 WL 6857328 at*10.

From this statutory scheme, it appears that “final decision allow[ing] the claim for benefits” refers to the initial opening of the claim.

RCW 51.32.185(9)(a).

- b. The phrase “the claim for benefits” is a term of art that refers to a worker asking the Department determine that the worker has an occupational disease and claim should be allowed**

The phrase “the claim for benefits” has a specific meaning under the Industrial Insurance Act. When determining the plain meaning of a phrase, the court gives considers all the text of the statute. *Larson*, 184 Wn.2d at 848. The phrase uses the word “the,” which denotes a specific item, as opposed to “a,” which denotes a generic item.⁶ Johnson construes this phrase to mean any time the worker asks the Department for benefits. CP 11. But the Legislature did not use the term “a,” or “any” instead it used “the.” This refers to a specific thing: the claim that a worker has alleging an occupational disease.

This interpretation is confirmed by the context of the remainder of the phrase: “the claim for benefits.” In the phrase, “the claim for benefits,” “the claim” is a term of art in RCW Title 51, referring to a

⁶“The” is “used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance.” <https://www.merriam-webster.com/dictionary/the>. “A” is “used as a function word before singular nouns when the referent is unspecified.” <https://www.merriam-webster.com/dictionary/a>.

worker's request for claim allowance when the worker has suffered an industrial injury or an occupational disease. RCW Title 51 consistently uses the term "the claim" to refer to the claim filed by the worker for the worker's injury or occupational disease, rather than an "application to reopen" or any "appeal" a worker might file to dispute the denial of other benefits under the open claim. *See* RCW 51.32.160(1)(d); RCW 51.52.060.

The Legislature adopted the fee provision in RCW 51.32.185(9)(a) in 2007 with knowledge about the relevant statutes in RCW Title 51 and an understanding how the Department adjudicates the Industrial Insurance Act through the regulations and case law interpreting the Act. Laws of 2007, ch. 490, § 5. *See ATU Legislative Council of Wash. State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002) ("The legislature is presumed to be aware of its own enactments[.]"); *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628, *amended*, 945 P.2d 1119 (1997) (legislature may acquiesce to regulatory language if the legislature does not change it), *disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003); *Bob Pearson Const., Inc. v. First Cmty. Bank of Wash.*, 111 Wn. App. 174, 179, 43 P.3d 1261 (2002) ("The legislature is presumed to know the case law construing statutes and to act consistently with such law unless it

clearly intends otherwise”). When the Legislature uses the same term in a provision more than once, they have the same meaning. *State v. Akin*, 77 Wn. App. 575, 580-81, 892 P.2d 774 (1995).

Showing that “claim” means the claim for occupational disease initially filed are one firefighter statute, one firefighter regulation, and four statutes relating to claim allowance.

RCW 51.32.185(9)(c): This provision in the firefighter attorney provision specifically references “the claim.” It says that when the costs of the appeal must be paid by the Department, “the costs shall be paid from the accident fund and charged to the costs of *the claim*.” This internal reference to “the claim” shows that when the Legislature used “the claim” when stating “allows the claim for benefits” it meant them to have the same meaning. *Akin*, 77 Wn. App. at 580-81.

WAC 296-14-310: this rule explains:

RCW 51.32.185 specifies a presumption that certain medical conditions are occupational diseases for firefighters. Those conditions are heart problems experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances; respiratory disease; specific cancers as defined by RCW 51.32.185; and infectious diseases as defined by RCW 51.32.185.

For claims filed on or after July 1, 2003, the presumption may not apply to heart or lung conditions if a firefighter is a user of tobacco products.

When the presumption does not apply, *the claim is not automatically denied*. However, the burden is on the

worker to prove that the condition is an occupational disease.

(Emphasis added.) The rule specifically uses the terms “claims” and “claim” in relation to the presumption. The rule plainly construes “claim” as the claim for coverage of the occupational disease. This rule was adopted in 2003 and the Legislature did not change it when it adopted the attorney fee provision in 2007. Wash. St. Reg. 03-12-046 (July 1, 2003); Laws of 2007, ch. 490, § 5. By not changing the rule, the Legislature has acquiesced to the Department’s meaning. *See Manor v. Nestle Food Co.*, 131 Wn.2d at 445 n.2.

RCW 51.28.050: this statute says that “[n]o application shall be valid or *claim* thereunder” maybe filed later than one year after an industrial injury. This is the claim to obtain benefits within the statute of limitations.

RCW 51.28.055: this statute provides that “to be valid and compensable,” “*claims* for occupational disease or infection . . . must be filed within two years following the date the worker had written notice from a physician . . .” This specially references claims for occupational diseases, and their original filing.

RCW 51.28.020: this statute addresses filing the initial application used to obtain compensation under the Industrial Insurance Act and uses

the term “occupational disease claims” in describing the duties of the Department to provide information to physicians providing services to workers seeking claim allowance. It provides “the department shall provide physicians with a manual which outlines the procedures to be followed in applications for compensation involving occupational diseases, and which describes claimants’ rights and responsibilities related to occupational disease claims.” RCW 51.28.020(b).

RCW 51.28.010: this statute demands that employers not engage in “claim” suppression by which it means intentionally “inducing employees to fail to report injuries,” “inducing employees to treat injuries in the course of employment as off-the-job injuries”; or “[a]cting otherwise to suppress legitimate industrial insurance claims.” These are all references to actions employers take to discourage a worker from seeking claim allowance.

All of these provisions show that “the claim for benefits” means the occupational disease claim at the outset. *See Raum*, 171 Wn. App. at 144.

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c. The term “allows” read along with “the claim for benefits” means claim allowance

The Court in *Weaver v. City of Everett* recognized that the phrase “the final decision allows the claim for benefits” equals to claim allowance. *Weaver*, 450 P.3d at 183. This is consistent with the regulations implementing the Industrial Insurance Act. . Besides a specific meaning for “[t]he claim for benefits,” the Department has many regulations that show that “allow[ing]” a claim for benefits has a specific meaning. In WAC 296-15-425(2), the rule says how disputes are handled “during the course of a claim (between the allowance and closure of a claim). In WAC 296-15-420(4), the Department instructs self-insured employers that “[i]f a self-insurer does not request allowance, denial, or an interlocutory order within sixty days [of “notice of claim”], the department will intervene and adjudicate the claim.”

In WAC 296-14-420, the Department addresses allowance of a claim and reopening of a claim: “Whenever an application for benefits is filed where there is a substantial question whether benefits shall be paid pursuant to the reopening of an accepted claim or allowed as a claim for new injury or occupational disease, the department shall make a

determination in a single order.” This regulation shows that “allow” is used when the worker files an initial application to obtain acceptance of injury or occupational disease. This contrasts with reopening where different terms are used. The Legislature would have understood that difference based on its reading of WAC 296-14-420; *see also* WAC 296-14-350(1).

In addition to regulations, there are many cases contemporaneous with adoption of the attorney fee provision in which “allow” is used in the context of accepting the initial filing for benefits for an industrial injury or occupational disease. *E.g.*, *Dep’t of Labor & Indus. v. Granger*, 159 Wn.2d 752, 755, 153 P.3d 839 (2007) (worker “filed an application with the Department, seeking industrial insurance benefits. The Department issued an order allowing his claim”); *Watson v. Dep’t of Labor & Indus.*, 133 Wn. App. 903, 907, 138 P.2d 177 (2006) (worker “filed a claim for worker’s compensation benefits. The Department allowed the claim . . .”); *Pollard v. Weyerhaeuser Co.*, 123 Wn. App. 506, 508, 98 P.3d 545 (2004) (worker “filed a claim for worker’s compensation. DLI allowed the claim. . .”); *Boeing v. Key*, 101 Wn. App. 629, 631, 5 P.2d 16 (2000) (worker “filed an application for benefits under the Industrial Insurance Act . . . [the Board ultimately] “allowed the claim as an industrial injury.”).

Based on the statutes, administrative regulations, and case law the Legislature understood “allows the claim for benefits” to refer to the initial claim that the worker has an occupational disease or industrial injury, and not to mean a reopening application. So not only did Johnson fail to show a “determination involving the presumption,” he has also failed to show a final decision that “allows the claim for benefits.”

B. Johnson’s Request to Shift Costs to the Department for His Reopening Appeal Does Not Further the Presumption’s Goal of Reducing the Difficulty in Identifying Work Conditions That Caused the Occupational Disease

The courts have recognized that the Legislature’s intent in creating the firefighter presumption was to relieve a firefighter of unique problems of proving that firefighting caused the firefighter’s occupational disease. *Spivey*, 187 Wn.2d at 734. The legislative intent appears to be simply to reduce the burden of getting the initial claim for benefits accepted. For the reasons discussed above, once a claim is accepted, the firefighter occupational disease claim is no different from any worker’s occupational disease claim. *See Raum*, 171 Wn. App. 124, 144.

The trial court’s reliance on liberal construction to come to a different result is misplaced. CP 187. The court does not apply the liberal construction rule in a workers’ compensation case in which the statutory language is unambiguous. *See Raum*, 171 Wn. App. at 155 n. 28 (quoting

Lowry v. Dep't of Labor & Indus., 21 Wn.2d 538, 542, 151 P.2d 822 (1944)). Because the statute is unambiguous, this Court interprets the plain language of RCW 51.32.185 and liberal construction does not apply. *See id.* at 155, n. 28. Here, the plain language leads to only one conclusion: firefighters have no right to fees for an appeal in a reopening case because they are no different from other workers once their claims are accepted. The Legislature choose to have fees in the circumstances of claim allowance. The Legislature could have drafted the statute to include an award of fees for *any* final order of the Board in which the firefighter prevailed, if that was its intent. Instead, it choose narrow circumstances. To express one thing in a law implies the exclusion of the other. *Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). This accords with the Legislature's intent to apply the presumption only at the claim opening stage when the Board applies the presumption when determining whether a worker has an occupational disease.

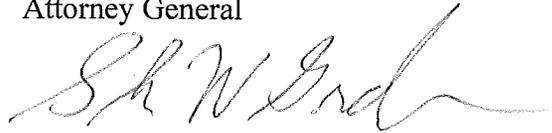
VII. CONCLUSION

The plain language of RCW 51.32.185(9)(a) does not authorize an award of attorney fees here. Firefighters may receive attorney fees at the Board of Industrial Insurance Appeals only “[w]hen a determination involving the [firefighter] presumption” “is appealed to the board of industrial insurance appeals and the final decision allows the claim for

benefits[.]” RCW 51.32.185(9)(a). Neither circumstance applies in a reopening appeal. This Court should reverse the trial court and grant summary judgment to the Department.

RESPECTFULLY SUBMITTED this 13th day of November 2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "S. W. Gordon", written in black ink.

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v.

CALVIN J. JOHNSON,

Respondent.

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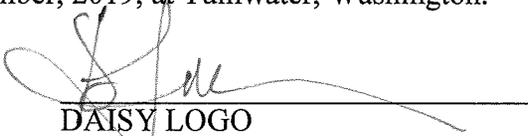
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